BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE, NO. 01-244 Case No. SC01-2670
(Judge Charles W. Cope)
/

SPECIAL COUNSEL'S RESPONSE

TO RESPONDENT'S MOTION FOR PROTECTIVE ORDER

The Special Counsel hereby responds to Respondent's Motion for Protective Order and Objection to Special Counsel's Motion to Compel Production Filed Under Seal and states:

Production of Alcohol-Related Records

1. Respondent seeks a protective order relieving him of his obligation to produce the documents requested by Request Number 9 of the Special Counsel's Request to Produce. Respondent has waived any such objection or demand. In his response to Request Number 9, Respondent stated, "Already produced. To the extent additional records exist will be produced [sic]." By agreeing to produce these documents and not lodging any objection in his response pursuant to Rule 1.350, Florida Rules of Civil Procedure, Respondent has waived any and all such objections. See, e.g., Day v. Boston Edison Co., 150 F.R.D. 16, 22 (D. Mass. 1993).

2. Moreover, Respondent's belated objections would be insufficient even had they been preserved. While the Special Counsel readily concedes that the requested documents – records regarding Respondent's treatment and diagnosis of substance abuse problems – are not relevant to proving the charges against Respondent, they are directly relevant to the defense Respondent's counsel has indicated Respondent will assert. Specifically, Respondent's counsel has made clear that much of Respondent's defense will be to blame his conduct on alcohol problems and to argue that he has sought and received

treatment and is "cured" of any problems. If he is going to assert this defense at the final hearing, the Special Counsel is entitled to discovery prior to Respondent's deposition. Savino v. Luciano, 92 So. 2d 817, 819 (1957) (holding that when a party asserts a claim or defense based upon a matter normally privileged, the proof of which requires the privileged matter to be offered into evidence, he waives the right to insist during discovery that the matter is privileged). Alternatively, the Hearing Panel may accept Respondent's implicit waiver of this defense by now arguing that his treatment for alcoholism is not relevant, which would of course bar him from raising this defense at trial. Thus, the Special Counsel is willing to withdraw his discovery request upon a concession by Respondent and/or an order by the Hearing Panel that Respondent will produce no evidence and make no argument at the final hearing that his conduct was the result of alcoholism, as opposed to malicious intent or that he sought received treatment or been rehabilitated. See, e.g., Int'l Tel. & Tel. Fla. v. United Tel. Corp. of Fla., 60 F.R.D. 177, 186 (M.D. Fla. 1973) (denying motion to compel privileged material but noting that "it should be made clear that the failure of a party to allow pre-trial discovery of confidential matter which that party intends to introduce at trial will preclude the introduction of that evidence").

3. Respondent's frequent contention that the Special Counsel has somehow admitted that records of alcohol treatment are not relevant is erroneous. The Special Counsel has never made such a statement. Respondent attaches certain confidential communications to his motion (in violation of Article VII, section (a)(4) of the Florida Constitution) regarding an offer by Special Counsel to listen to what Respondent has to say about his treatment for alcoholism. This offer was made, however, in response to Respondent imploring the Special Counsel to receive this testimony outside of the public record. The Special Counsel informed Respondent that no proceedings in the above-captioned case could be

conducted outside of the public record under the Florida Constitution. Once formal charges have been filed, the proceedings must be public. Respondent (personally and through counsel) indicated that once the Special Counsel heard what he had to say, it might be possible to settle this case, but that Respondent wished to avoid the embarrassment of having his medical problems fully aired in public. In an effort to accommodate Respondent, the Special Counsel made the offers related in the letters attached to Respondent's Motion. Upon further consideration, the Special Counsel withdrew the offer to avoid any appearance that the Judicial Qualifications Commission might be circumventing the mandate that all proceedings following a notice of formal charges be public.

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4. In direct violation of Article VII, section (a)(4) of the Florida Constitution, Respondent discloses information about an alleged matter pending before the Investigative Panel, including identifying a witness thereto. The strict constitutional mandate of confidentiality is designed not only to protect the judges under investigation, but also to protect complainants and witnesses. In re Graziano, 696 So. 2d 744, 751 (Fla. 1997).

5. Though cognizant of his own duty to maintain the confidentiality of any investigation to the extent possible, the Special Counsel is forced to respond to Respondent's accusations of prosecutorial misconduct to refute what may be an attempt to fabricate a record to support a due process challenge to the ultimate disposition. Respondent's statement that the Special Counsel has served him with a 6(b) notice is false. Respondent's accusation that the Special Counsel has unilaterally initiated an investigation without the knowledge and consent of the Investigative Panel is false. Respondent's accusation that the Special Counsel has submitted any information that he knows or reasonably should know is untrue to the

Investigative Panel is false. Respondent's statement that Brooke Kennerly, the Executive Director of the Commission, has advised Mr. Kwall that no new investigation had been initiated is false.

[1] Respondent's statement that the Special Counsel has records that indicate that Respondent has received a clean bill of physical and psychological health is false. Respondent's statement that the Special Counsel knows that Respondent has not been hospitalized or on a suicide watch is false. Respondent's accusation that the Special Counsel submitted a false affidavit to Respondent's former attorney in California is false.

WHEREFORE, the Special Counsel requests that the Hearing Panel deny Respondent's Motion for Protective Order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and regular U.S. mail to: **Louis Kwall, Esq.**, Kwall, Showers & Coleman, P.A., 133 N. St. Harrison Ave., Clearwater, Florida 33755; **Robert W. Merkle, Jr., Esq.**, Co-Counsel for Respondent, 5510 W. La Salle Street, #300, Tampa, Florida 33607-1713; **Judge James R. Jorgenson,** Chair of the Judicial Qualifications Commission Hearing Panel, 3rd District Court of Appeal, 2001 S.W. 117th Ave., Miami, Florida 33175-1716; **John Beranek, Esq.,** Counsel to the Hearing Panel of the Judicial Qualifications Commission, P.O. Box 391, Tallahassee, Florida 32301; **Brooke S. Kennerly,** Executive Director of the Florida Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303; **Thomas C. MacDonald, Jr., Esq.**, General Counsel to the Investigative Panel of the Judicial Qualifications Commission, 100 North Tampa Street, Suite 2100, Tampa, Florida 33602 this 26th day of February, 2002.

By:
John S. Mills, Esq.
Florida Bar No. 0107719
Special Counsel

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[1] Ms. Kennerly made clear to Mr. Kwall that she was not at liberty to confirm or deny the existence of an investigation. Whether there is a pending investigation is not relevant to any issue before the Hearing Panel and is not something that Respondent is entitled to know unless and until a 6(b) notice is issued.

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